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No. 01-1640

In The Supreme Court of the United States

SHASTA COUNTY, BRADD McDANNOLD and DAVID COMPOMIZZO,

Petitioners,

vs.

THOMAS BREWSTER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Brewster v. Shasta County, 275 F.3d 803 (9th Cir. 2001), holds that California sheriffs act on behalf of their respective counties when setting policies for investigating crimes. The opinion is a thoughtful, well-founded and routine application of the analysis set forth in *McMillian v. Monroe County*, 520 U.S. 781 (1997), for determining which government officials are final policymakers for entity defendants sued under 42 U.S.C. § 1983.

Respondent Thomas Brewster was exonerated by DNA results obtained during his trial on capital murder and rape charges. He then filed this suit, claiming that two Shasta County sheriff's department detectives manipulated evidence to create a false impression that he was the perpetrator. Petitioners' motion for summary judgment was denied. *Brewster v. Shasta County*, 112 F.Supp.2d 1185 (E.D. Cal. 2000). The Ninth Circuit affirmed, rejecting petitioners' claim that policymaking decisions regarding law enforcement by California sheriffs should be attributed to the state rather than counties, thus allowing Mr. Brewster to pursue a claim against Shasta County pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978).[1] That claim remains pending in the trial court, with no trial date set.

The certiorari petition does not focus on a *McMillian* analysis of whether California sheriffs act on behalf of the

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[1] Both the district court and the Court of Appeals in unpublished opinions denied qualified immunity for petitioners Bradd McDannold and David Compomizzo, the two sheriff's department investigators. (The former is misidentified in the petition caption as "Brad McDonald.") These qualified immunity rulings are not challenged in the certiorari petition.

state or their counties when setting policy relating to the investigation of crimes – the issue addressed by the parties in the district court and the Ninth Circuit. Instead petitioners fire a broadside at section 1983 litigation in general, contending that "law enforcement officers" "employed by a local governmental entity" are entitled to "Eleventh Amendment immunity" when "engaged in the investigation of a violation of State law." Pet. Cert. at 1.

This novel and extreme argument was not raised below – for good reason. The Eleventh Amendment has never been held to bar section 1983 actions against law enforcement officers in their individual capacities, including those employed by state agencies; it bars only official capacity suits against state officials. *See, e.g., Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985) (explaining distinction). This certiorari petition reads as if its authors do not understand the difference between claims made against public officials in their individual capacities as opposed to those made against them in their official capacities. Were the law as petitioners suggest, liability under section 1983 – which requires state action as an element of liability – could not be established.

Moreover, petitioners confuse the absolute immunity afforded judges and prosecutors with the qualified immunity available to law enforcement officers. *See* Pet. Cert. at 7-10. If this Court were to hold that law enforcement officers are entitled to the same absolute immunity as judges and prosecutors – as opposed to qualified immunity – it would overrule *Monroe v. Pape*, 365 U.S. 473 (1961), thus ending police misconduct litigation in the federal courts.

Brewster does not represent a departure from established law. It follows *Streit v. County of Los Angeles*, 236 F.3d 552 (9th Cir.), *cert. denied*, 122 S.Ct. 59 (2001) (California sheriffs act for county when managing jails), was itself followed by *Bishop Paiute Tribe v. County of Inyo*, 275 F.3d 893 (9th Cir. 2002) (California sheriffs and district attorneys act for county when investigating crimes),[2] and is consistent with *Weiner v. San Diego County*, 210 F.3d 1025 (9th Cir. 2000) (California district attorneys act for state when prosecuting crimes). These four cases demonstrate that the Ninth Circuit, like other lower courts, has no difficulty applying *McMillian*. Moreover, no significant conflicts have developed among other federal or state courts.

In short, the standards of rule 10 have not been met and this petition for a writ of certiorari should be denied.

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[2] The opinion in *Bishop Paiute Tribe* was rendered less than a week after the Ninth Circuit's opinion in *Brewster*. *Bishop Paiute Tribe* did not mention the Ninth Circuit *Brewster* opinion but did approve the published district court opinion in *Brewster* and reached the same conclusion as the Ninth Circuit did in *Brewster*.

The petition states that *Bishop Paiute Tribe* "is currently pending before the Ninth Circuit *en banc*." Pet. Cert. at 10 n. 1. That statement was never true. A petition for rehearing with a suggestion for review en banc was pending before the original panel when the petition was filed. Later it was denied because "no judge of the court . . . requested a vote on whether to rehear the matter en banc." Order Amending Opinion and Denying the Petition for Rehearing and the Suggestion for Rehearing En Banc (filed May 20, 2002).

ARGUMENT

I. *BREWSTER* APPLIED *McMILLIAN* PROPERLY WHEN IT DETERMINED THAT IN CALIFORNIA SHERIFFS ACT ON BEHALF OF COUNTIES WHEN INVESTIGATING CRIMES.

In *McMillian*, the Court, analyzing Alabama constitutional, statutory and decisional law, concluded that for section 1983 purposes Alabama sheriffs are policymakers for the state, and not their respective counties, when setting policy for law enforcement functions. In doing so, the Court identified several unique and historically specific aspects of Alabama law that influenced its decision and directed the lower courts to conduct both state-by-state and function-by-function analyses when applying *McMillian* in other situations.[3]

In their "Reasons for Granting Certiorari" petitioners claim that in *McMillian* "this Court concluded that a County Sheriff enjoys Eleventh Amendment immunity

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[3] Unlike California and many other states, Alabama expressly makes its sheriffs members of the State Executive Committee, along with the Governor and other state-wide officials. *McMillian* noted that the turn-of-the-century amendments to the Alabama Constitution which incorporated sheriffs into the executive branch of the state government demonstrated "the framers' intent to ensure that sheriffs be considered executive officers of the state," 520 U.S. at 789 (citing *Parker v. Amerson*, 519 So.2d 442, 444 (Ala. 1987)), to "solidify the place of the sheriffs in the executive department, and to clarify that sheriffs were acting for the State when exercising their law enforcement functions." *Id.* at 788. There are reasons peculiar to the deep south for Alabama's including sheriffs in state government. "Historically, Alabama county sheriffs were squarely placed under state control to stop them from assisting lynch mobs in killing black prisoners." *Streit*, 236 F.3d at 561 n. 11.

when acting on behalf of the State." Pet. Cert. at 6. Not only is the Eleventh Amendment not mentioned in *McMillian* – or in *Brewster* for that matter – the Court expressly rejected "a uniform, national characterization for all sheriffs," noting that "States have wide authority to set up their state and local governments as they wish," and that "the importance of counties and the nature of county government have varied historically from region to region, and from State to State." 520 U.S. at 795. Since "both the role of sheriffs and the importance of counties vary," "there is no inconsistency created by court decisions that declare sheriffs to be county officers in one State, and not in another." *Id.*

Moreover, *McMillian* requires a function-by-function analysis to determine whether a policymaker is acting on behalf of the state or a county. "A court's task is to 'identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue.'" *Id.* at 784-85 (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989)).

Significantly, when the petitioner in *McMillian* pointed out that "most Federal Courts of Appeals have found county sheriffs to be county, not state, officials," the Court responded that there was no danger its conclusion regarding Alabama "will either call these decisions into question or create an unacceptable patchwork of rulings as to section 1983 liability of counties for the acts of their sheriffs. We reject both arguments: The first ignores the history of sheriffs, and the second ignores our Nation's federal nature." *Id.* at 793.

Brewster begins its analysis of whether California sheriffs act on behalf of their counties when investigating crime by noting that although *Streit v. County of Los Angeles*, 236 F.3d 552 (9th Cir.), *cert. denied*, 122 S.Ct. 59 (2001), a case involving jail management, "does not resolve the question presented in the instant case, the analysis of California law governing sheriffs already undertaken in *Streit* provides the starting point for our own analysis." *Brewster*, 275 F.3d at 806.

> The question in *Streit* was whether a California sheriff, in administering the county's policy for release from county jails, acted for the county or the state. We began our analysis with an examination of the California Constitution, which identifies California sheriffs as county officials. Unlike the Alabama Constitution that the Supreme Court considered in *McMillian*, "the California Constitution does not list sheriffs as part of 'the state executive department.'" *Streit*, 236 F.3d at 561 (quoting *McMillian*, 520 U.S. at 787, 117 S.Ct. 1734) (internal quotation marks omitted). "Instead, Article XI, section 1(b) of the California Constitution designates sheriffs as county officers." *Id.* . . .
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> . . . .The Supreme Court explained in *McMillian* that it was "critical" for the case and "strong evidence in favor of the . . . conclusion that sheriffs act on behalf of the State" that a judgment against an Alabama sheriff would be a suit against the State, and that the county would not be liable for a sheriff's acts under respondeat superior. 520 U.S. at 789, 117 S.Ct. 1734; *see also Streit*, 236 F.3d at 562. Here, however, California law places liability on the county. Cal. Gov. Code § 815.2; *Streit*, 236 F.3d at 562.

. . . . The California Code also provides that California sheriffs are elected county officers. *Id.* at 562 (citing Cal. Gov. Code § 24000(b); Cal. Elec. Code § 314). Sheriffs are required to maintain their offices at the county seat with other county officers. *Id.* (citing Cal. Gov. Code § 24250). Sheriff vacancies are filled in the same manner as other elective county officers. *Id.* (citing Cal. Gov. Code § 24205). The services of the sheriff may be contracted out by the county – not the state. *Id.* (citing Cal. Gov.Code § 53069.8). We found that "[t]hese various state provisions lead inexorably to the conclusion that the [sheriff] is tied to the County in its political, administrative, and fiscal capacities." *Id.*

Finally, we examined California case law and concluded that the relevant cases further supported our holding that the county was liable for the sheriff's actions. *Id.* at 562-63 (discussing *Sullivan v. County of Los Angeles*, 527 P.2d 865, 868-69 (Cal. 1974) (holding that the county was liable for the sheriff's failure to release a prisoner who had completed a sentence), and *Beck v. County of Santa Clara*, 204 Cal.App.3d 789, 251 Cal.Rptr. 444 (1988) (holding that control over the local prisons is within the authority of the individual counties)). We rejected the county's reliance on *County of Los Angeles v. Superior Court (Peters)*, 68 Cal.App.4th 1166, 80 Cal.Rptr.2d 860 (1998), in which the California Court of Appeal held that the Los Angeles Sheriff's Department was a state actor and therefore immune from section 1983 liability. We noted that the cases presented distinct factual scenarios. *Streit*, 236 F.3d at 564. Moreover, we explained that we were not bound by the conclusion of the California Court of Appeal in *Peters*, because the question

> regarding section 1983 liability ultimately implicated federal, not state, law. *Id.* Our examination of "the precise function at issue in conjunction with the state constitution, codes, and case law" led us to "conclude that the [sheriff] acts as the final policymaker for the county when administering the County's release policy." *Id.* at 564-65, 80 Cal.Rptr.2d 860.

Id. at 806-07. Although addressing a jail policy, *Streit* noted that in California the sheriff's department "is generally a county, not state, agency." *Streit*, 236 F.3d at 561. Thus, "[i]t require[d] little extension of *Streit*" for the *Brewster* court "to conclude that the Shasta County Sheriff acts for the County, not the state, when investigating crime in the county." *Brewster*, 275 F.3d at 80; *accord Bishop Paiute Tribe v. County of Inyo*, 275 F.3d 893 (9th Cir. 2002).[4]

Streit, *Brewster* and *Bishop Paiute Tribe* follow the line of Ninth Circuit cases holding California counties liable under section 1983 for constitutional deprivations by sheriffs. *See, e.g., Henry v. Shasta County*, 132 F.3d 512,

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[4] The holdings of *Streit*, *Brewster* and *Bishop Paiute Tribe* are consistent with the "home rule" operating principle of California government. *See Dibb v. County of San Diego*, 8 Cal.4th 1200, 1206-19, 884 P.2d 1003, 1006-15, 36 Cal.Rptr.2d 55, 58-67 (1994) (state constitution grants "home rule" to counties by means of charters).

McMillian cited a study "explaining how regional influences have resulted in different forms of county government in different States" and listing Alabama in the lowest third of all states in the amount of discretionary authority granted to its counties. 520 U.S. at 795. California is in the upper third, the group of states granting the most discretionary authority to counties. De Santis & Renner, *Governing the County*, in *County Governments in an Era of Change* 19, Table 2.1 (P. Berman ed. 1993).

518 (9th Cir. 1997), *amended*, 137 F.3d 1372, *cert. denied sub nom. Pope v. Henry*, 525 U.S. 819 (1998) (practice of submitting recalcitrant motorists to unpleasant jail conditions); *Navarro v. Block*, 72 F.3d 712, 714 (9th Cir. 1995) (discriminatory treatment of 911 calls); *Redman v. County of San Diego*, 942 F.2d 1435, 1455 (9th Cir.), *cert. denied*, 502 U.S. 1074 (1991) (practice not to segregate "aggressive" homosexuals from vulnerable detainees); *Bouman v. Block*, 940 F2d 1211, 1231 (9th Cir. 1991) (discrimination in promotion of female deputies); *Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989) ("custom" of unconstitutional jail conditions); and *Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1460-61 (9th Cir. 1988), *cert. granted and remanded on other grounds*, 490 U.S. 1087 (1989), *reinstated*, 886 F.2d 235 (9th Cir.), *cert. denied*, 494 U.S. 1091 (1990) (deliberate indifference to psychological needs of suicidal county jail prisoners).

Streit, *Brewster* and *Bishop Paiute Tribe* are also consistent with decades of California state court decisions imposing liability on counties for the actions of sheriffs and their deputies. *See*, e.g., *Sullivan v. Los Angeles County*, 12 Cal.3d 710, 717, 117 Cal.Rptr. 241, 245 (1974) (failure to release prisoner from jail); *Nelson v. Superior Court (County of Los Angeles)*, 89 Cal.App.4th 565, 107 Cal.Rptr.2d 469 (2001) (death of improperly restrained arrestee); *Choate v. County of Orange*, 86 Cal.App.4th 312, 103 Cal.Rptr.2d 339 (2000) (partygoers brawl with deputies); *Newton v. County of Napa*, 217 Cal.App.3d 1551, 266 Cal.Rptr. 682 (1990) (alleged battery and false imprisonment of children during abuse investigation); *Bastian v. County of San Luis Obispo*, 199 Cal.App.3d 520, 245 Cal.Rptr. 78 (1988) (negligence); *Allison v. County of Ventura*, 68 Cal.App.3d 689, 137 Cal.Rptr. 542 (1977)

(defective arrest warrant); *Marshall v. Los Angeles County*, 131 Cal.App.2d 812, 281 P.2d 544 (1955) (personal injury of county prisoner).

In sum, like *Streit* and *Bishop Paiute Tribe*, *Brewster* was correctly decided in light of *McMillian* and apposite state and federal precedent addressing California sheriffs. Accordingly, there is no reason for the Court to review the case now.

II. *BREWSTER* IS CONSISTENT WITH OTHER COURTS APPLYING THE *McMILLIAN* ANALYSIS.

A. Cases Arising In California

There are five published decisions in addition to *Streit* and *Brewster* applying *McMillian* to California sheriffs and two applying it to district attorneys. *Bishop Paiute Tribe* applies it to both. The holdings do not conflict, and do not suggest that the Court should grant certiorari to clarify the law.

The district court opinion in *Brewster* is one of two published trial court orders that a county has section 1983 liability for its sheriff's policies and practices in law enforcement. The other, *Roe v. County of Lake*, 107 F.Supp.2d 1146 (N.D. Cal. 2000) (policies relating to female crime victims), contains an excellent summary of the role of the California sheriff:

> Recognizing that local police power is derived from the State, *McMillian* requires a court to analyze the delegation of that power to determine whether it was sufficiently complete such that a suit for abuse of that power is not a suit against the State. It seems clear from the analysis

> above that California's delegation of authority to [the county sheriff] is sufficiently complete. It is difficult to see how a judgment against a sheriff who, as is alleged here, permits his office to violate the civil rights of women in the way he maintains his staff and sets his policies, will operate as a judgment against the State. . . . The deterrent effect of paying any judgment plaintiff may obtain will be felt in Lake County. If the public is dissatisfied with the way [the sheriff] treats women victims, he will either not be reelected by the voters of Lake County or he will be impeached before a Lake County grand jury. It is hard to see how any of this will violate California's sovereignty.

107 F.Supp.2d at 1151-52.

There are two published district court opinions holding that the sheriff acts for the county in the function of jail administrator. *Von Colln v. County of Ventura*, 189 F.R.D. 583 (C.D. Cal. 1999) (strapping inmates into inhumane "chair"); *Leon v. County of San Diego*, 115 F.Supp.2d 1197 (S.D. Cal. 2000) (indifference to inmates' medical needs). On the other hand, in *Hawkins v. Comparet-Cassani*, 33 F.Supp.2d 1244 (C.D. Cal. 1999), *rev'd in part on other grounds*, 251 F.3d 1230 (9th Cir. 2001) (deputy sheriff acting as court bailiff activated electric belt on order of judge to shock pro per criminal defendant), the district court held that a sheriff, when setting policy for the deputy sheriffs who staff the state's superior courts, acts as a policymaker for the state rather than the county.

The California Supreme Court, in *Pitts v. County of Kern*, 17 Cal.4th 340, 345, 949 P.2d 920, 923, 70 Cal.Rptr. 823, 826 (1998), applied *McMillian* and decided that "a California district attorney acts on behalf of the state . . .

when preparing to prosecute and while prosecuting criminal violations of state law, and when establishing policy and training employees in these areas." The Ninth Circuit independently reached the same conclusion in *Weiner v. County of San Diego*, 210 F.3d 1025 (9th Cir. 2000).[5] In both cases, the courts stressed the quasi-judicial role played by prosecutors as well as California's long history of treating district attorneys in their prosecutorial role as state officials. *See, e.g., Weiner*, 210 F.3d at 1030 ("In 1894, the California Supreme Court held that the district attorney . . . '[i]n the prosecution of criminal cases . . . acts by

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[5] Petitioners cite *Weiner* with approval, *see, e.g.*, Pet. Cert. at 13, although it rejects the contention made at pages 11 and 12 of the petition that under *McMillian* federal courts must parrot state-court conclusions regarding whether a public official acts on behalf of the state for purposes of § 1983 liability:

> In *Pitts v. County of Kern*, 17 Cal.4th 340, 70 Cal.Rptr.2d 823, 949 P.2d 920 (1998), the California Supreme Court, following *McMillian*, analyzed California law and held that a district attorney was a state official for purposes of § 1983 liability while acting in his prosecutorial capacity. *See id.* at 928-34. The California Supreme Court is the ultimate interpreter of California state law. *See Johnson v. Fankell*, 520 U.S. 911, 916, 117 S.Ct. 1800, 138 L.Ed.2d 108 (1997). This does not mean, however, that we must blindly accept its balancing of the different provisions of state law in determining liability under § 1983.
>
> In *McMillian*, the Court stated that "our inquiry is dependent on an analysis of state law," which does not mean "that state law can answer the question for us by, for example, simply labeling as a state official an official who clearly makes county policy. But our understanding of the actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official's function under relevant state law." *McMillian*, 520 U.S. at 785, 117 S.Ct. 1734 (emphasis added). We must, therefore, examine California's constitution, statutes, and case law.

210 F.3d at 1028-29.

the authority and in the name of the people of the state.' *Modoc County v. Spencer*, 103 Cal. 498, 37 P. 483, 484 (1894).").

Weiner is limited to the function of criminal prosecutions. "Although a California district attorney is a state officer when deciding whether to prosecute an individual, this is not to say that district attorneys in California are state officers for all purposes. To the contrary, California law suggests that a district attorney is a county officer for some purposes." *Weiner*, 210 F.3d at 1031. Similarly, *Pitts* makes clear that the "conclusion as to which entity the district attorney represents might differ were plaintiffs challenging a district attorney's alleged action or inaction related to ... [an] administrative function arguably unrelated to the prosecution of state criminal law violations." 17 Cal.4th at 363. Thus, petitioners are not correct in stating that "[D]istrict attorneys are immune from 1983 claims." Pet. Cert. at 13.

The care in which the Ninth Circuit has followed *McMillian*'s admonition to make determinations function-by-function is illustrated by its recent opinion in *Bishop Paiute Tribe*. Officials from the district attorney's office and sheriff's department investigating alleged welfare overpayments together executed a search warrant on offices of an Indian tribe. Noting that the administration of welfare in California is, by statute, a county function,[6] and that no prosecutions had as yet been instituted, the Ninth Circuit concluded that both the sheriff and district

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[6] Cal. Welf. & Inst. Code § 10800 provides that the administration of public social services is "declared to be a county function and responsibility and therefore rests upon the boards of supervisors in the respective counties."

attorney acted on behalf of the county. *Id.* at 273. ("There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, . . . and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested.") (citing *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993)).[7]

The Ninth Circuit's careful consideration of the structure of California government and its function-by-function approach in *Weiner, Streit*, *Brewster* and *Bishop Paiute Tribe* contrasts favorably with the perfunctory decision of a California intermediate appellate court in *County of Los Angeles v. Los Angeles Superior Court (Peters)*, 68 Cal.App.4th 1166, 80 Cal.Rptr.2d 860 (1998), on which petitioners place much weight. *See* Cert. Pet. at 23-25. *Peters* failed to address California's constitutional structure, salient state statutes, and key decisions from the California Supreme Court. It did not focus on the function involved – the jail's "determining whether to release a person who may be subject to arrest on an outstanding warrant," *Peters*, 68 Cal.App.4th at 1177 – when concluding that the sheriff was acting on behalf of the state. In any event, because the sheriff was carrying out a state court order, rather than exercising the plenary

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[7] The distinction between prosecutorial and law enforcement functions is mirrored in California's government tort claims act, which provides absolute immunity for malicious prosecution while preserving governmental liability for false arrest and imprisonment. *See Asgari v. City of Los Angeles*, 15 Cal.4th 744, 937 P.2d 273, 63 Cal.Rptr.2d 842 (1997). This differentiation derives from the common law (*cf. Imbler v. Pachtman*, 424 U.S. 409, 421-24 (1976) (common law provided absolute immunity for prosecutors)) which "has never granted police officers an absolute and unqualified immunity." *Pierson v. Ray*, 386 U.S. 547, 555 (1967).

duties of the sheriff's department, the *holding* of *Peters* harmonizes with the other California-based decisions, even though some of its language might not.[8]

B. Cases Arising In Other Jurisdictions.

In the brief time since *McMillian* was decided, the lower federal and state courts have applied its analysis to a wide variety of cases involving sheriffs. If there is a pattern emerging, it is that when sheriffs are engaged in law enforcement, jail management, or personnel administration, courts are more likely to find that they are local policymakers, recognizing that Alabama's change in law to incorporate its sheriffs into the state government does not generally parallel laws in other states. On the other hand, when sheriffs faithfully execute court processes – such as writs or warrants – courts generally find that sheriffs act on behalf of the state, much like prosecutors do. In other words, the lower courts have adhered to the Court's direction that the question of state-versus-local authority be resolved on a state-by-state and function-by-function basis, and appear to have encountered little difficultly doing so.

1. Law Enforcement.

Since *McMillian*, on the few occasions that circuit courts considered sheriffs in states other than Alabama and California they have determined that in exercising law enforcement functions the sheriff is a local or county

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[8] The flaws in *Peters* suggest the sort of "blatant effort to shield . . . local governments from liability" Chief Justice Rehnquist cautioned against in *McMillian*. *See* 520 U.S. at 796.

policymaker. *Franklin v. Zaruba*, 150 F.3d 682 (7th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999) (Illinois), and *Grech v. Clayton County*, 288 F.3d 1287 (11th Cir. 2002) (Georgia).

Generally lower courts outside the deep south have agreed that sheriffs exercising their law enforcement functions act on behalf of their counties. For example, in *Abraham v. Piechowski*, 13 F.Supp.2d 870 (E.D. Wis. 1998), the trial court, after noting that "*McMillian* recognized that the importance of counties and the nature of county government may vary from state to state, which can impact a court's characterization of the sheriff," found that under the Wisconsin law (a statutory and constitutional framework which, like that of California, originally derived from the laws of New York) the sheriff was a local policymaker. *Id.* at 879. Similar determinations were reached in Tennessee, *Spurlock v. Sumner County*, 42 S.W.3d 75 (Tenn. 2001), and Pennsylvania. *Open Inns, Ltd. v. Chester County Sheriff's Department*, 24 F.Supp.2d 410, 413 (E.D. Pa. 1998) (sheriff's policy of allowing deputies to assist private parties in seizing personal property without "any inquiry into the legality of such actions" ("don't ask, don't think") to be that of a local policymaker).

2. Jail Management and Administration

Noting that *McMillian* recognized that a sheriff's policymaking capacity would vary from state to state, courts not addressing Alabama law have uniformly found that sheriffs are local officials regarding jail policies. *See Ramsey v. Schauble*, 141 F.Supp.2d 584 (W.D.N.C. 2001); *Boncher v. Brown County*, 272 F.3d 484 (7th Cir. 2001) (Wisconsin); *DeGenova v. Sheriff of DuPage County*, 209

F.3d 973 (7th Cir. 2000) (Illinois). In contrast, *Turquitt v. Jefferson County*, 137 F.3d 1285 (11th Cir.), *cert. denied*, 525 U.S. 874 (1998), applied the *McMillian* analysis to Alabama and recognized that after *McMillian* concluded that Alabama sheriffs were state policymakers for law enforcement purposes, a new examination had to be performed for the jail-management function. *Turquitt* concluded that the reasons underlying the unusual role of sheriffs in Alabama state government made sheriffs state policymakers in their jail management function as well as in their law enforcement function.

3. Employment and Personnel Policies

Not surprisingly, several courts have found that in matters of employment and personnel policies, sheriffs who have the power to hire, fire and discipline department employees act in a local policymaking capacity. See, e.g., *Jeffes v. Barnes*, 208 F.3d 49 (2d Cir.), *cert. denied sub nom. County of Schenectady v. Jeffes*, 531 U.S. 813 (2000); *Brady v. Fort Bend County*, 145 F.3d 691 (5th Cir. 1998), *cert. denied,* 525 U.S. 1105 (1999); *Aleman v. Milwaukee County*, 35 F.Supp.2d 710 (E.D. Wis. 1999).

4. Staffing Courts and Executing Process

In *Alencastro v. Sheahan*, 297 Ill.App.3d 478, 698 N.E.2d 1095 (1998), the court was confronted with a suit arising from the service of an eviction writ. The court found that "the defendant was a state actor in executing the court order for possession," relying on Illinois law requiring that "sheriffs shall serve and execute all warrants, process, orders, and judgments of every description

that may legally be directed or delivered to them." *Id.* at 483, 698 N.E.2d at 1099.

On the other hand, in *Richman v. Sheahan*, 270 F.3d 430 (7th Cir. 2001), a case in which deputy sheriffs serving as courtroom bailiffs killed a man appearing in traffic court while restraining him, the Court of Appeals denied a motion to dismiss brought by the sheriff, who claimed he was acting in the capacity of a state officer. "The sheriff has no discretion in whether to obey a judge's orders, but we are aware of no state policy directing the sheriff's actions regarding the training and supervision of deputies in the use of force in carrying out state court orders." *Id.* at 440.

These and other cases[9] decided in the five years since *McMillian* underscore *McMillian*'s clarity and the uniformity with which its analysis has been applied – even though, as should be the case in light of *McMillian's* analytical framework, the outcome varies from state-to-state and from function-to-function.

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[9] *McMillian* has also been applied to decide whether particular officials other than sheriffs are state or local policy makers. *E.g., Burge v. Parish of St. Timony*, 187 F.3d 452 (11th Cir. 1999) (holding district attorneys to be local); *Carter v. City of Philadelphia*, 181 F.3d 339 (3d Cir.) (same), *cert. denied sub nom. Roe v. Carter*, 528 U.S. 1005 (1999); *Myers v. County of Orange*, 157 F.3d 66 (2d Cir. 1998) (district attorney's blanket policy of not accepting cross-complaints in criminal cases was local, despite the fact that district attorneys would be immune from liability for *initiating* prosecutions), *cert. denied*, 525 U.S. 1146 (1999); *Pharris v. Looper*, 6 F.Supp.2d 720 (M.D. Tenn. 1998) (holding county assessors to be local).

CONCLUSION

For the foregoing reasons, respondent asks that the Court deny the petition for certiorari.

Dated: Pasadena, California, June 5, 2002

Respectfully submitted,

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